Kilang Kosfarm Sdn Bhd v Kosma Nusantara Bhd

HIGH COURT (TEMERLOH) — CIVIL SUIT NO 22-32 OF 2001
RAMLY ALI J
22 MARCH 2002

Civil Procedure *— Injunction — Application for — Erinford injunction and inter partes injunction, effect of dismissal of — Balance of convenience — Whether likelihood of successful appeal being rendered nugatory*

On 10 October 2001, the plaintiff had filed a writ of summons (vide encl 3) against the defendant. On the same day, the plaintiff filed another application (vide encl 5) on a certificate of urgency, for an ex parte injunction compelling the defendant to surrender vacant possession of the land and to restrain the defendant from interfering and obstructing the plaintiff in carrying out its obligation under the 'Oil Palm Plantation Operation and Maintenance Contract' dated 1 July 1999. The ex parte application was granted on 17 October 2001 and by virtue of O 29 r 1(2BA) of the Rules of the High Court 1980, the ex parte application lapsed after the expiry of 21 days from the date of the issue. In other words, the ex parte injunction expired and lapsed on 7 November 2001. On 2 November 2001, the plaintiff filed an inter partes application for an injunction (vide encl 18). The inter partes application was dismissed. Upon dismissal of the inter partes application, the plaintiff filed a notice of appeal dated 22 January 2002 against the decision. Subsequent to that, the plaintiff then, on 7 February 2002, filed the present application for Erinford injunction (vide encl 52) pending disposal of the above appeal by the Court of Appeal.

Held:

(1) The same principles of law were applicable to an application for stay of execution and an application for interim preservation order (which included an application for an Erinford injunction). However, an application for an Erinford injunction was not really the same with an application for stay of execution. In an application for an Erinford injunction, the court had earlier dismissed an application, and pending appeal of the dismissal, the unsuccessful party then applied for a limited injunction pending the appeal. There was no order to be executed by the successful party in this case. An application for an Erinford injunction must be considered as an original application, ie an application started by itself (see p 668D–G).

(2) The relevant period of status quo in the present case must be the period immediately before the plaintiff filed his writ of summons (encl 3) and his ex parte application for injunction (encl 5) against the defendant. During that period the state of affair between the

parties was that the relevant agreement between them had been terminated by the defendant; the plaintiff's service and job (to collect the oil palm fruits under the agreement) had also been terminated; and the plaintiff was ordered to leave the land and to stop collecting the fruits. If that 'status quo' was to be preserved, then the plaintiff's application must fail (see p 671D–E).

(3) The effect of the present Erinford injunction and the earlier inter partes injunction, which was dismissed on 18 January 2002 was the same. The effect on the parties, particularly the defendant was also the same. There was no change of circumstances and no new material evidence adduced. Therefore, there was no reason why the balance of convenience should change. The defendant would suffer greater hardship if the injunction was granted. On the premise, the balance of convenience in this case lied more in favour of the defendant. It lied in favour of the injunction pending appeal being refused (see pp 671G–I, 672D).

(4) Whether or not the plaintiff succeeds in the appeal and in the main action would not be effected by its failure to obtain the present Erinford injunction. There would be no impediment to the plaintiff enforcing any judgment in its favour should it succeed in its appeal and ultimately in its writ. There was no evidence to show that the defendant would be in no position financially to honour the judgment obtained by the plaintiff. Therefore, there was no likelihood of a successful appeal being rendered nugatory (see p 673A–B).

(5) In the present case, damages seem to be a suitable and adequate remedy. The plaintiff would be adequately compensated in damages for the temporary damage suffered between now and the date when the appeal was heard if the earlier decision was reversed by the Court of Appeal (see p 673C).

[Bahasa Malaysia summary

Pada 10 Oktober 2001, plaintif telah memfailkan satu writ saman (melalui lampiran 3) terhadap defendan. Pada hari yang sama, plaintif telah memfailkan satu lagi permohonan (melalui lampiran 5) dalam satu perakuan segera, untuk satu injunksi ex parte mendorong defendan menyerahkan milikan kosong tanah tersebut dan untuk menyekat defendan daripada campur tangan dan menghalang plaintif daripada melaksanakan tanggungjawabnya di bawah 'Kontrak Operasi dan Penyelenggaraan Minyak Kelapa Sawit' bertarikh 1 Julai 1999. Permohonan ex parte tersebut dibenarkan pada 17 Oktober 2001 dan menurut A 29 k 1(2BA) Kaedah-Kaedah Mahkamah Tinggi 1980, permohonan ex parte tersebut telah luput selepas tamat tempoh 21 hari daripada tarikh pengeluaran. Dalam erti kata lain, injunksi ex parte tersebut telah tamat tempoh dan luput pada 7 November 2001. Pada 2 November 2001, plaintif telah memfailkan satu

permohonan inter partes untuk satu injunksi (melalui lampiran 18). Permohonan inter partes tersebut telah ditolak. Selepas penolakan permohonan inter partes tersebut, plaintif telah memfailkan satu notis rayuan bertarikh 22 Januari 2002 terhadap keputusan tersebut. Berikutan itu, plaintif kemudiannya, pada 7 Februari 2002, telah memfailkan permohonan ini untuk injunksi Erinford (melalui lampiran 52) sementara menunggu penyelesaian rayuan di atas oleh Mahkamah Rayuan.

Diputuskan:

(1) Prinsip undang-undang yang sama terpakai untuk satu permohonan penggantungan pelaksanaan dan satu permohonan untuk perintah pemeliharaan interim (yang termasuk permohonan satu injunksi Erinford). Bagaimanapun, satu permohonan untuk satu injunksi Erinford bukanlah sama dengan satu permohonan penggantungan pelaksanaan. Dalam satu permohonan untuk satu injunksi Erinford, mahkamah telah sebelumnya menolak satu permohonan, dan sementara menunggu rayuan terhadap penolakan tersebut, pihak yang tidak berjaya kemudiannya telah memohon satu injunksi terhad sementara menunggu rayuan tersebut. Tiada perintah yang perlu dilaksanakan oleh pihak yang berjaya di dalam kes ini. Satu permohonan untuk satu injunksi Erinford perlu diambilkira sebagai satu permohonan asal, iaitu satu permohonan yang dimulakan sendiri (lihat ms 668D–G).

(2) Tempoh statuts quo yang relevan dalam kes ini mestilah tempoh sejurus selepas plaintif memfailkan writ saman beliau (lampiran 3) dan permohonan ex parte untuk injunksi (lampiran 5) terhadap defendan. Dalam tempoh tersebut, kedudukan semasa antara pihak-pihak adalah di mana perjanjian yang relevan antara mereka, telahpun ditamatkan oleh defendan; perkhidmatan dan kerja plaintif (untuk mengutip buah kelapa sawit di bawah perjanjian tersebut) juga telah ditamatkan; dan plaintif telah diperintahkan untuk meninggalkan tanah tersebut dan berhenti daripada mengutip buah-buahan tersebut. Jika 'kedudukan semasa' sebegini dipelihara, maka permohonan plaintif mesti gagal (lihat ms 671D–E).

(3) Kesan injunksi Erinford sekarang dan injunksi inter partes sebelum ini, yang telah ditolak pada 18 Januari 2002 adalah sama. Kesan ke atas pihak-pihak tersebut, khususnya defendan adalah juga sama. Tiada perubahan keadaan dan tiada bahan keterangan yang baru telah dikemukakan. Oleh itu, tiada sebab kenapa imbangan kesesuaian patut ditukar. Defendan akan mengalami kesusahan yang berat jika injunksi tersebut dibenarkan. Berdasarkan premis ini, imbangan kesesuaian dalam kes ini lebih berpihak kepada defendan. Ia berpihak kepada injunksi sementara menunggu rayuan ditolak (lihat ms 671G–I, 672D).

(4) Sama ada atau tidak plaintif berjaya dalam rayuan dan tindakan utama tidak akan memberi kesan daripada kegagalannya untuk mendapatkan injunksi Erinford sekarang ini. Tiada halangan kepada plaintif untuk menguatkuasakan apa-apa penghakiman yang berpihak kepadanya sekiranya ia berjaya dalam rayuannya dan berikutnya dalam writ beliau. Tiada keterangan menunjukkan bahawa defendan tidak akan berada dalam kedudukan kewangan untuk mematuhi penghakiman yang didapati oleh plaintif. Oleh itu, tiada kebarangkalian satu rayuan yang berjaya dikatakan tidak berguna (lihat ms 673A–B).

(5) Dalam kes sekarang, ganti rugi dilihat sebagai satu remedi yang sesuai dan memadai. Plaintif akan diberi pampasan ganti rugi yang memadai terhadap kerugian yang dialami dari sekarang hingga tarikh apabila rayuan didengar jika keputusan terdahulu diakaskan oleh Mahkamah Rayuan (lihat ms 673C).]

Notes

For cases on injunction, application for, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2464–2471.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)

Associated Tractors Sdn Bhd v Chan Boon Heng & Anor [1990] 2 MLJ 408 (refd)

Cocoa Processors Sdn Bhd v United Malayan Banking Corp Bhd & Ors (No 2) [1988] 3 MLJ 497 (refd)

Erinford Properties Ltd v Cheshire County Council [1974] 2 All ER 448 (refd)

Garden Cottage Foods Ltd v Milk Marketing Board [1984] AC 130 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

London & Blackwell Rly Co v Cross (1886) 31 Ch D 354 (refd)

Ooi Meng Sua v Aetna Universal Insurance Sdn Bhd [1994] MLJU 12 (refd)

Perumahan Wira Seberang Sdn Bhd v Lim Teng Huat & Ors and third party [1995] MLJU 156 (refd)

See Teow Guan v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)

Wilson v Church (1879) 11 Ch D 576 (refd)

Legislation referred to

Rules of the High Court 1980 O 29 r 1(2BA)

V Manoharan (*PY Chong* with him) (*Nordin Torji & Partners*) for the plaintiff.

Bastian Vendargon (*GJ Goldie* with him) (*Vendargon & Partners*) for the defendant.

Ramly Ali J: This is an application by the plaintiff (vide encl 52) for an Erinford injunction pending disposal of an appeal by the Court of Appeal against the decision of this court in dismissing the plaintiff's application for an inter partes interlocutory injunction (see [2002] MLJU 173). The order prayed for by the plaintiff in the present Erinford injunction is the same with the order prayed for in the earlier inter partes application, except in the earlier application, the injunction was to cover the period until disposal of the writ of summons filed earlier, while in the present Erinford injunction, the period to be covered is pending disposal of the appeal by the Court of Appeal. In the present application, the plaintiff prayed for the following order:

> 1 Bahawa defendan, pengarah-pengarah, pegawai-pegawainya, pekerja-pekerjanya, kontraktor-kontraktornya atau ejen-ejennya ditahan dari mengganggu atau menghalang plaintif dari melaksanakan hak-hak plaintif dan/atau menunaikan obligasi plaintif mengikut perjanjian 'Oil Palm Plantation Operation and Maintenance Contract' yang ditandatangani pada 1 Julai 1999 dan/atau menghalau plaintiff daripada milikan tanah di bawah pegangan PT 1298 HS (D) 1295 dan PT 2602 HS(D) 1410 yang kedua-dua terletak di dalam Mukim Keratong, Daerah Rompin, Pahang sementara menunggu penyelesaian akhir rayuan plaintif terhadap perintah Yang Arif Datuk Ramly bin Haji Ali yang diberikan pada 18 Januari 2002 kepada kandungan 18 yang mana notis rayuan bertarikh 22 Januari 2002 telah pun difailkan.

Background of the case

On 10 October 2001, the plaintiff had filed a writ of summons against the defendant, praying, inter alia, for the following orders:

> 1 satu deklarasi bahawa defendan telah menyangkal/menolak perjanjian 'Oil Palm Plantation Operation and Maintenance Contract' yang mengikat plaintif dan defendan tanpa alasan yang munasabah;
>
> 2 perintah defendan kembalikan milikan dua bidang tanah: PT 1298 HS(D) dan PT 2602 HS (D) 1410, kedua-duanya dalam Mukim Keratong, Daerah Rompin, Pahang kepada plaintif dan seterusnya menahan defendan dari mengganggu atau menghalang plaintif dari menunaikan kerja-kerja plaintif mengikut perjanjian tersebut;
>
> 3 gantirugi am dan exemplary;
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> 4 satu penyiasatan diadakan untuk menaksirkan kerugian yang dialami plaintif dari masa plaintif disingkir milikan Ladang Kosma 9 sehingga masa apabila plaintif dikembalikan milikan Ladang Kosma 9. Defendan diperintah mengemukakan akaun yang menunjukkan jumlah buah kelapa sawit mentah yang telah dituai dan diangkut dari Ladang Kosma 9 semasa Ladang Kosma 9 dalam milikan defendan.

On the same day, the plaintiff filed another application (vide encl 5) on a certificate of urgency, for an ex parte injunction compelling the defendant to surrender (kembalikan) vacant possession of the said land, and to restrain

the defendant from interfering and obstructing the plaintiff in carrying out its obligation under the 'Oil Palm Plantation Operation and Maintenance Contract' ('the Contract') dated 1 July 1999. The said ex parte application was granted on 17 October 2001 and by virtue of O 29 r 1(2BA) of the Rules of the High Court 1980 ('the RHC'), the said ex parte application lapsed after the expiry of 21 days from the date of the issue. In other words, the said ex parte injunction expired and lapsed on 7 November 2001. On 2 November 2001, the plaintiff filed an inter partes application for an injunction (vide encl 18) praying for an order, inter alia, that:

> Bahawa defendan, pengarah-pengarah, pegawai-pegawainya, pekerja-pekerjanya, kontraktor-kontraktornya atau ejen-ejennya ditahan dari mengganggu atau menghalang plaintif dari melaksanakan hak-hak plaintif dan/atau menunaikan obligasi plaintif mengikut perjanjian 'Oil Palm Plantation Operation and Maintenance Contract' yang ditandatangani pada 1 Julai 1999 dan/atau menghalau plaintif daripada milikan tanah di bawah pegangan PT 1298 HS (D) 1295 dan PT 2602 HS (D) 1410 kedua-dua dalam Mukim Keratong, Daerah Rompin, Pahang, Pahang.

The said inter partes application was dismissed with costs on the grounds that:

(1) the balance of convenience lies in favour of the defendant; and

(2) damages seem to be a suitable and adequate remedy if the plaintiff succeeds in his writ of summons against the defendants.

Upon dismissal of the said inter partes application, the plaintiff filed a notice of appeal dated 22 January 2002 against the said decision.

Subsequent to that, the plaintiff then, on 7 February 2002, filed the present application for an Erinford injunction pending disposal of the above appeal by the Court of Appeal.

I have scrutinized all the three applications for the injunction filed by the plaintiff, namely encl 5, (ex parte); encl 18 (inter partes) and encl 52 (Erinford). Enclosure 5, in it's nature, is considered as a mandatory injunction, ie ordering the defendant to surrender vacant possession of the said land to the plaintiff to enable the plaintiff to continue performing their jobs as provided under the relevant agreement between them. While encll 18 and 52 are more in the form of prohibitory injunction with the same effect, except for encl 18, the time limit is until disposal of the writ of summons while for encl 52, the time limit is until disposal of the appeal filed by the plaintiff.

The counsel for the plaintiff argued that the present application should be granted on the following grounds:

(1) that status quo must be maintained pending disposal of the appeal;

(2) that the appeal would be rendered nugatory in the event the plaintiff succeed in it if the application is not granted;

(3) that there exists special circumstances that warrant the granting of the application;

(4) that the balance of convenience lies in favour of the plaintiff; and

(5) that damages is not an adequate remedy.

The plaintiff relied his application on the strength of the principles established in *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448 which empowers the court to grant a further limited interim injunction pending the hearing and disposal of an appeal, even though the earlier inter partes application for an injunction has been dismissed. The plaintiff also cited the case of *See Teow Guan v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 to support his contention that the paramount consideration governing an application to grant a stay of proceedings or stay of execution or an application for some other interim preservation order of an appeal is that the appeal, if successful, should not be rendered nugatory and if, upon balancing all the relevant factors, it is clear that an appeal would be rendered nugatory without the grant of a stay or the interim preservation order, a stay or other appropriate interim relief should normally be directed.

Findings of the court

I agree with the plaintiff's contention that the same principles of law are applicable to an application for stay of execution and an application for an interim preservation order (which includes an application for an Erinford injunction). The ruling of the Court of Appeal in *See Teow Guan*'s case seems to support the contention. However, it must be stressed that in nature and effect, an application for an Erinford injunction is not really the same with an application for a stay of execution. Both are different. In an application for a stay of execution, the court had earlier made an order granting certain application, which can be executed by the successful party, and the unsuccessful party, after having filed his notice of appeal against the said order, applies for a stay of execution of the said order. However, in an application for an Erinford injunction, the court had earlier dismissed an application, and pending appeal of the said dismissal, the unsuccessful party then applied for a limited injunction pending the appeal. There is no order to be executed by the successful party in this case. Of course the successful party ought to be free to act despite the pendancy of the appeal. On this issue, Meggary J in *Erinford* had said at p 451:

> The answer to this was that no question of staying proceedings could arise, for the action had been dismissed and so there was nothing to stay.

An application for an Erinford injunction must be considered as an original application, ie an application started by itself. To support this, Jessel MR in *Wilson v Church* (1879) 11 Ch D 576 said:

> No one can say that this is an application to stay proceedings in the action. The action was dismissed. This is an original motion.

It is well settled that this court has jurisdiction to hear and determine an application for an Erinford injunction (as in the present case). It is not necessary for the applicant to apply to the Court of Appeal. *Erinford* has established this principle, which has been followed by our courts in

Malaysia (see *Cocoa Processors Sdn Bhd v United Malayan Banking Corporation Bhd & Ors (No 2)* [1988] 3 MLJ 497; *Ooi Meng Sua v Aetna Universal Insurance Sdn Bhd* [1994] MLJU 12 and *Perumahan Wira Seberang Sdn Bhd v Lim Teng Huat & Ors and third party* [1995] MLJU 156). In *Erinford*, Megarry J has said the following at p 454:

> I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion, the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial, the question is whether the plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial, the judge becomes *functus officio quoad* granting any injunction at all.
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> There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in *Wilson v Church (No 2)* (1879) 12 Ch D 454, where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, 'when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory'. That was the principle which Pennycuick J applied in the *Orion Proprty Trust Ltd v Du Cane Court Ltd, General London & Urban Properties Ltd v Du Cane Court Ltd* [1962] 3 All ER 466; and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative.

From the above passage, the relevant principles expounded by Megarry J (as far as the present application is concerned) could be summarized as follows:

(1) that a decision that no injunction should be granted pending the trial is not inconsistent with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction;

(2) that by refusing an injunction pending the trial, the judge does not become *functus officio quoad* granting any injunction at all;

(3) that the balance of convenience (ie the comparative effects of granting or refusing an injunction pending an appeal) are such that it would be right to preserve the status quo pending the appeal;

(4) that it would be wrong to grant an injunction pending appeal in cases where the appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid;

(5) that when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory; and

(6) that an injunction pending appeal is not applicable in cases where damages seem to be a suitable and adequate remedy;

(7) that to grant or not to grant the injunction is a matter of the court's discretion which must be exercised based on the facts of each particular case. It is not a matter of right.

In *Cocoa Processors Sdn Bhd*, Mohamed Dzaiddin J (now Chief Justice), in applying the same principles established in *Erinford*, dismissed the plaintiff's application for an Erinford injunction on the grounds that there was no likelihood of a successful appeal being rendered nugatory; that the balance of convenience lies in favour of the injunction pending appeal being refused; and that damages seem to be a suitable and adequate remedy, if the appeal is allowed. Again, in *Ooi Meng Sua*, Vincent Ng J has also applied the same principles and refused the plaintiff's application for an Erinford injunction. In doing so, the learned judge has also considered that there would be no impediment to the plaintiff enforcing any judgment in his favour should he succeed in his intended appeal, as the defendant company is a refutable insurance company. In other words, the learned judge considered that damages was a suitable and adequate remedy, in the event the plaintiff succeed in his appeal.

In another case, *Perumahan Wira Seberang Sdn Bhd*, Jeffrey Tan JC (as he then was) went a step further when he ruled that an Erinford injunction proceeds on the premise of a subsisting injunction being dissolved, but to preserve the status quo pending an appeal against the order of dissolution, the order dissolving the subsisting injunction is temporarily stayed until the outcome of the appeal. In that case, the earlier ex parte injunction had lapsed automatically under O 29 r 1(2B) of the RHC when the inter partes application was heard and dismissed. The court dismissed the plaintiff's application for an Erinford injunction on the ground that when the application inter partes was refused, there was no subsisting injunction to be dissolved. There was also no order dissolving a subsisting injunction to be stayed pending the outcome of an appeal.

Maintaining status quo

The concern of the plaintiff in the present case is to preserve the status quo so that the appeal, if successful, would not be nugatory. It is however not clear as to what the period of status quo that the plaintiff is asserting in the present cases. What the plaintiff is more interested in is that the plaintiff

should be allowed to remain in the said land and to harvest the oil palm fruits pending disposal of his appeal; and not to be evicted by the defendant who is the owner of the said land.

What is 'status quo' for the purpose of granting an interlocutory injunction? The 'status quo' is the existing state of affairs, but since state of affairs do not remain static, this raise a query: existing when? In *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, Lord Diplock stated at p 131:

> The relevant status quo which it was said in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, it is a counsel of prudence to preserve when other factors are evenly balanced, is state of affairs existing during the period immediately the preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise, the state of affairs before the last change would be the relevant status quo.

Applying the above principle, I am of the view that the relevant period of status quo in the present case must be the period immediately before the plaintiff filed his writ of summons (encl 3) and his ex parte application for injunction (encl 5) against the defendant. During that period, the state of affairs between the parties was that the relevant agreement between them has been terminated by the defendant; the plaintiff's service and job (to collect the oil palm fruits under the agreement) has also been terminated; and the plaintiff was ordered to leave the said land and to stop collecting the fruits. If that 'status quo' is to be preserved, then the plaintiff's application must fail.

In any event, the issue of 'status quo' is only relevant to be considered in cases where the balance of convenience is evenly balanced. This principle has been decided in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; and *Garden Cottage Foods*, In the present case, the balance of convenience clearly lies in favour of the defendant. Therefore, the question of maintaining status quo, as requested by the plaintiff, does not arise.

Balance of convenience

The effect of the present Erinford injunction and the earlier inter partes injunction, which I have dismissed on 18 January 2002 is the same, except that in the earlier inter partes injunction, the duration of injunction applied for was 'until the final disposal of the main writ', while in the present Erinford injunction, the duration of the injunction applied for was 'until disposal of the appeal'. The length of time may be the same. The effect on the parties, particularly the defendant, is also the same. There is no change of circumstances and no new material evidence adduced. Therefore, there is no reason why the balance of convenience should change.

As I have stated in my earlier grounds of judgment, the defendant would suffer greater hardship if the injunction is granted. At all material times, the defendant was and still the rightful owner of the said oil palm

estate. The said contract dated 1 July 1999 between the plaintiff and the defendant was to appoint the plaintiff as contractor to operate and maintain the said estate ('OSMA 9') for a period of 20 years, and during that period, the plaintiff is entitled to purchase the oil palm fruits harvested from the said estate. Their relationship has become strained. In the circumstances, the continuation of the said contract may not be commercially viable in the future. In the long run, the defendant, being the rightful owner of the said estate, may suffer long term losses and these losses could not be compensated under the contract. The contract does not provide for such losses suffered by the defendant.

Under the said contract, the defendant has the right to terminate the contract by giving three months' notice in writing to the plaintiff in the event of the plaintiff not discharging its duties in accordance with the terms and conditions of the contract. However, if the plaintiff was wrongly terminated, the said contract expressly provides that the defendant shall forthwith pay liquidated damages to the plaintiff 'a sum of RM5m for loss of profit, and a further sum for all the relevant capital outlay, expenses, disbursements, fees, charges, out of pocket expenses, incurred, paid or lost in commencing and continuing with the work'. The parties to the contract have agreed to the provisions. Therefore, they are bound by the provisions.

On the premise, I am convinced that the balance of convenience in this case lies more in favour of the defendant. It lies in favour of the injunction pending appeal being refused.

Appeal rendered nugatory

The main ground for the present application by the plaintiff is that the appeal, if successful, shall not be rendered nugatory and therefore the application for an injunction pending the appeal should be granted. The plaintiff is relying on the principle established in *Erinford* which says that 'when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not nugatory.' In *Cocoa Processors Sdn Bhd*, Mohamed Dzaiddin J (now Chief Justice J) in considering the same issue, has said:

> Megarry J in *Erinford* recognized that one of the factors in granting the application was the possibility that the judgment might be reversed or varied. I agree that this is an important factor in favour of the plaintiff. On the other hand, there are other considerations, eg 'where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on'. Therefore considering the submissions of counsel from the point of view of *Erinford* principles, I find merits in the defendants' objection. Having considered the whole position of the case, I am of the view that whether or not the plaintiff succeeds in the appeal and in the main action will not be affected by its' failure to obtain this further interim injunction.

In order to assist me in exercising my discretion on this matter, it is pertinent to see that there would be no impediment to the plaintiff enforcing any judgment in its favour should the plaintiff succeed in its intended appeal as well as the main writ. Whether a successful appeal by the plaintiff against

my earlier decision being rendered nugatory or not, we have to go back to the plaintiff's claim against the defendant in its writ and statement of claim. I have scrutinized all the prayers in the plaintiff's statement of claim (as listed above) and am satisfied that whether or not the plaintiff succeeds in the appeal and in the main action will not be effected by its failure to obtain the present Erinford injunction. There would be no impediment to the plaintiff enforcing any judgment in its favour should it succeed in its appeal, and ultimately in its writ. There is no evidence to show that the defendant would be in no position financially to honour the judgment obtained by the plaintiff. Therefore, I must say quite confidently that there is no likelihood of a successful appeal against my decision being rendered nugatory.

Damages an adequate remedy

In the present case, damages seem to be a suitable and adequate remedy. The plaintiff would be adequately compensated in damages for the temporary damage suffered between now and the date when the appeal is heard, if my earlier decision is reversed by the Court of Appeal. The plaintiff's claim against the defendant in the writ and statement of claim is based on the strength of the Contract dated 1 July 1999 between the plaintiff and the defendant. There is an express provision in the said contract about 'liquidated damages' which says that:

> In the event OSMA breaching the terms of this contract by unilaterally terminating the contract for the work, then OSMA shall forthwith pay KKSB a sum of RM5m as liquidated damages for loss of profit, and a further sum for all the relevant capital outlay, expenses, disbursements, fees, charges, out of pocket expenses incurred, paid or lost in commencing and continuing with the work.

Furthermore, in prayers three and four of the statement of claim, the plaintiff is asking for general and exemplary damages and to assess the damages suffered by the plaintiff from the time the plaintiff was expelled from the said estate until the time when vacant possession of the said estate was handed over to the plaintiff, as prayed in prayer two of the statement of claim. On all those provisions, I am satisfied that damages seem to be a suitable and adequate remedy for the plaintiff.

It is trite law that an injunction is not an appropriate remedy if damages is a suitable and adequate remedy. This principle has long been established in *London & Blackwell Rly Co v Cross* (1886) 31 Ch D 354 (at p 369) where Lindley LJ said:

> The very first principle of injunction law is that prima facie you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy.

This principle was followed by Hashim Yeop Sani CJ (Malaya) in *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408, when he said at p 409:

> But it would seem quite clear that the most important factor to consider as a matter of principle is the question of whether in lieu of the injunction,

> damages would be an adequate and proper remedy, because in the matter of injunctions and exercising its jurisdiction the court acts upon the principle of preventing irreparable damage.

In *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, the Court of Appeal touched on the same issue. In that case, Gopal Sri Ram JCA, said the following at p 207:

> Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in making the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial.

Even in *Erinford* itself, the court had granted the application for an injunction pending appeal on the ground that it was not a case in which damages was a suitable and adequate remedy. Megarry J, in that case, concluded at p 454:

> ... that I granted Mr New Som the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative.

Again, in *Cocoa Processors Sdn Bhd* and *Ooi Meng Sua*, the court dismissed the plaintiff's application for an injunction pending appeal on one of the grounds that damages seem to be a suitable and an adequate remedy.

Conclusion

Applying the above principles, and after considering all the relevant considerations, I have no hesitation to hold that the present application is not an appropriate case for me to exercise my discretion in favour of the plaintiff, and therefore the application is dismissed with costs.

Order accordingly.

Reported by Peter Ling